* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **FAO No. 33/2001**

% **Date of Decision**: 21st **March, 2007**

SMT. ANITA DEVI & ORS. .... Appellants
Through Mr. J.S. Kanwar, Advocate

VERSUS

SH. MOHINDER SINGH & ORS. ..... Respondents
Through : Mr. K.L. Nandwani, Advocate.

CORAM:
HON'BLE MR .JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not ?

3. Whether the judgment should be reported in the Digest ?

SANJIV KHANNA, J:

1. The appellants herein are wife, mother and children of late Mr. Jai Kishan, the deceased. They have filed the present Appeal under Section 173 of the Motor Vehicles' Act, 1988 (hereinafter referred to as the Act, for short) against the impugned award dated 31st July, 1995 dismissing their claim petition on the ground that the appellants had not been able to establish and prove that rash and negligent driving by the driver of bus No. DL-1P-2754 had caused injuries which resulted in the death of the deceased.

2. Learned Tribunal disregarded the statement of PW-3, Mr. Ved

Prakash Gupta-alleged eye witness, inter alia, holding that his name did not figure in the FIR and in the list of witnesses filed by the police in the criminal prosecution initiated against the driver of the aforesaid bus viz. Mr. Raj Kumar. Learned Tribunal has held that as there was no eye witness to the accident, it has not been proved and established that late Mr. Jai Kishan had died in the accident due to rash and negligent driving by Mr. Raj Kumar. The claim petition was accordingly dismissed.

3. I have heard the learned counsel for the appellants and the insurance company. The other respondents namely the owner and the driver have failed to appear and have been proceeded ex parte. They were proceeded ex parte even before the learned Tribunal. I have also gone through the statements of the witnesses.

4. I agree with the findings of the learned Tribunal that statement of PW-3, Mr. Ved Prakash Gupta, alleged eye witness is not reliable. Police did not record statement of Mr. Ved Prakash Gupta and he was not shown as a witness in the list filed before the criminal court. As per the FIR and the charge-sheet no eye witness who had seen the accident could be located. Therefore, Mr. Ved Prakash Gupta's statement before the Tribunal that he was behind the bus in question and saw the accident in which the deceased was injured has been rightly disregarded. He claimed that he knew the deceased and his

family before the accident but there is no explanation and reason why he did not tell the police about the accident.

5. However, there is evidence to show that the accident had taken place on 24th April, 1995, when the deceased was going on a scooter. There is also material and evidence to show that bus No. DL-1P-2754 (red line bus) on route No. 1028 from Uttam Nagar to Shahdara was involved in the said accident. The involvement of the said bus is proved and established from the FIR, the charge sheet and certified copies of papers filed before the criminal court. In the claim petition the bus number and details of the FIR No. 267/1995 registered under Sections 279/337 and 304A of the Indian Penal Code had been mentioned. The insurance company did not deny the involvement of the said bus in the said accident. The registration of the FIR was also not denied. Moreover, statement of Head Constable Ranbir Singh, Police Station Seelampur, Record Clerk was recorded. He duly proved the FIR i.e. FIR No. 267/1995. The FIR states that at about 7.58 a.m., daily-diary entry report was recorded in respect of the accident near ISBT. When the designated police officer reached the spot, he found that a red line bus bearing No. DL-1P-2754 and a scooter bearing No. DL-2SA-8908 had met with an accident. The FIR further states that the scooter driver who had been injured had been taken to GTB hospital in the PCR van.

The designated officer thereafter reached GTB hospital and he obtained the medical legal report of the deceased. The deceased was not in a fit condition to give statement and was declared unfit for statement. The police officer did not find any eye witness in the hospital. Thereafter, the police officer came back to the spot but again did not find any eye witness. Thereafter, the FIR was registered. In the criminal prosecution as there was no eye witness, the accused, the driver Mr. Raj Kumar was acquitted. However, the said acquittal by itself will not result in dismissal of the claim petition. (See in this regard N.K.V. Bros.(P) Ltd. Versus M.Karumai Ammal (1980) 3 SCC 457).

6. It may be relevant to state here that the owner of the bus had initially appeared before the learned Trial Court on 8th April, 1996 but thereafter had stopped appearing. The driver of the bus did not appear and was served by publication and proceeded ex parte. The FIR and the certified copy of the charge sheet as filed before the Tribunal, show that there were no eye witnesses to the accident. It is also admitted case that the deceased, i.e. Mr. Jai Kishan who was driving the scooter has expired and therefore not available to give his version of the accident.

7. Unlike Sections 140 and 163A of the Act, a petition under Section 166 of the Act, requires proof of negligence for

compensation to be awarded. A petition under Section 166 of the Act can be dismissed if it is found as a fact that the deceased or the victim was himself responsible for the accident. Specific exceptions have been carved out under sub sections 3 and 4 of Section 140 and sub section 2 of Section 163A of the Act to the above rule. Section 166 of the Act, does not have any statutory exceptions to this general rule for awarding compensation under Law of Torts. In Minu B. Mehta and another versus Balkrishna, AIR 1977 SC 1248, it was held by the Supreme Court that proof of negligence is necessary before compensation can be awarded under section 110 A of the Motor Vehicles Act, 1939. It was observed that under the Law of Torts mere involvement of a motor vehicle in an accident does not make the owner or the driver of the motor vehicle liable. Liability arises under the Law of Torts when the motor vehicle is used negligently or rashly. Section 166 of the Act or Section 110 of the Motor Vehicles Act, 1939 does not fasten no fault liability or absolute liability on the owner or driver. Proof of negligence as prescribed under the Law of Torts continues to remain the lynch pin for claiming damages under Section 110 A of the Motor Vehicles Act,1939. The ratio of the said decision shall equally apply to a petition filed under Section 166 of the Act. This decision of the Supreme Court was clarified in Gujarat State Transport Corporation versus Ramanbhai,

AIR 1987 SC 1690. In the said case, the Supreme Court had examined Sections 92A to 92E that were introduced in the Motor Vehicles Act, 1939. It was held that the said part of the Motor Vehicles Act, 1939 was clearly a departure from the common law principle that negligence must be established for claiming compensation from the owner and the driver of the motor vehicle. Thus, unless statutory departure has been made under the provisions of the Act, negligence must be established before compensation can be awarded.

8. Negligence is not taking care, where there is duty to take care. It is contrary to diligence. To find out whether there was lack of care and diligence test of reasonable man is applied. Negligence means breach of provisions of law as also breach of duties caused by omission to do something which a prudent and reasonable man guided by considerations ordinarily regulating human conduct would do; or would not do. Standard of care under the given circumstances expected of a reasonable man is the bench mark.

9. Negligence is not a question of evidence, but an inference derived from facts. To establish negligence wrongful intention is not required to be proved. A person may be negligent even if he has no mens rea or wrongful intention and or desired to cause the accident. Negligence is failure to take proper care as a reasonable man would

have done under the circumstances. Requirement of culpable mind is not a valid defence to a claim under the Act based upon negligence. Wrongful intent is not required to be proved. Wrongful intention therefore is not an essential pre-condition for allowing a claim under the Act.

10. In civil proceedings or proceedings under the Act, the question of negligence is decided on the basis of preponderance of probabilities. Burden of proof is a matter of law and pleadings. However, onus and discharge of the same is a matter relating to adducing of evidence. Normally, onus to prove negligence in a claim under Section 166 of the Act is upon the claimant. But in some cases this normal rule can cause considerable hardship. This can happen when the reason and true cause of the accident are only within the knowledge of the respondent. In such cases, it is impossible for the claimant to establish negligence on the part of the respondent. Inference as to negligence may be drawn by courts and tribunals from proved circumstances by applying Rule of Res Ipsa Loquitor. In Black's law dictionary the said rule has been described as under:

> “It is said that res ipsa loquitur does not apply if the cause of the harm is known. This is a dark saying. The application of the principle nearly always presupposes that some part of the causal process is known, but what is lacking is evidence of its connection with the

> defendant's act or omission. When the fact of control is used to justify the inference that defendant's negligence was responsible it must of course be shown that the thing in his control infact caused the harm. In a sense, therefore, the cause of the harm must be known before the maxim can apply." H.L.A Hart & Tony Honore. Causation in the law 419-420 (2d ed 1985).

11. The aforesaid rule is based upon common sense. It enables courts and tribunals to do justice when facts relating to cause of the event (accident) are unknown to the claimant and ought to be in the knowledge of the opposite side. It is for the opposite side to give explanation for cause of the accident, which does not happen in ordinary course and when due caution and care is taken. The event or the accident itself is treated as an evidence of negligence as more likely than not, the accident could not have happened, if reasonable care and caution had been taken. Of course, it is open to the respondent to show and establish that the accident was inevitable or a result of negligence by the claimant, victim or the deceased. When a person drives a motor vehicle he acts at his peril. He is aware that accidents can happen, cause injury and harm to a third person. If injury is caused, he is answerable (not per-se liable) to the claimant suo pericelo -without further proof by the claimant of his negligence. Lord Normand in Barkway versus South Wales Transport Co. Ltd (1950) 1 392 explained it as under:-

> " It can rarely happen when a road accident occurs that there is no other evidence, and if the cause of the accident is proved, the maxim res ipsa loquitur is of little moment. The question then comes to be whether the owner has performed duty of care incumbent upon him, or whether he is by reason of his negligence responsible for the injury. The maxim is no more than a rule of evidence affecting onus. It is based on common sense and its purpose is to enable justice to be done when the facts bearing on causation and the case exercised by the defendant are at the outset unknown to the plaintiff and are ought to be within the knowledge of the defendant."

12. The above principle was applied by the Supreme Court in the case of Pushpa Bai Purshottam versus Ranjit Ginning and Pressing Company Private Limited, (1977) 2 SCC 745, wherein it was observed as under:

> **"6.** The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur.* The general purport of the words *res ipsa loquitur* is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Salmond on the *Law of Torts* (15th Edn.) at p.

> 306 states: The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused. In *Halsbury's Laws of England* , 3rd Edn., Vol. 28, at p. 77, the position is stated thus: An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged a; negligence “tells it own story” of negligence on the part of the defendant, the story so told being clear and unambiguous. Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part. For the application of the principle it must be shown that the car was under the management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used proper care. “

13. In Syad Akbar versus State of Karnataka, (1980) 1 SCC 30, the Supreme Court however observed that some caution needs to be exercised for applying the said principle. It was accordingly held that the circumstances constituting the event or the accident should proclaim in a concordant, clear and unambiguous voice towards negligence by the respondent. In such cases, the said rule of evidence can be applied if the court or the tribunal is satisfied that

the event that caused the accident was within the respondent's control.

14. In Kaushnuma Begum and Others versus New India Assurance Company Limited and others, 2001 ACJ 428, the Supreme Court applied this principle after referring to decision in the case of Rylands versus Fletcher, 1861-73 ALL ER 1. While referring to this principle it was held that it presumes that a person is prima facie answerable for all damage caused as a result of mischief or mishap, which takes place due to mischief or mishap that could be perceived. In such circumstances, the onus is upon the respondent. He can escape his liability by showing that the mischief or mishap was caused due to act of God, fault of the victim or the deceased or for some other justifiable and legally acceptable reason. This rule is based upon the principle that a person is supposed to know the consequences and problems that could result, when he deals with or does any act which is capable of causing damage or harm to third parties.

15. The principle of Res Ipsa Loquitur was applied in Cholan Roadways Ltd. versus G. Thirugnanasambandam, (2005) 3 SCC 241. It was held that once the doctrine is found to be applicable, the burden of proof would shift on the respondent and the respondent has to prove that the vehicle was not being driven by him rashly and

negligently.

16. In the present case, involvement of red line bus No. DL-1P-2754 is not in doubt. The fact that the said bus was involved in the accident with the two wheeler scooter that was being driven by the deceased-late Mr. Jai Kishan on 24th April, 1995 at 7.40 a.m. is proved beyond doubt. This is an admitted fact. Certified copies of the FIR, DD entries, post mortem report and medical records have been filed on record. The medical records also show that the deceased was admitted to the hospital at 8.40 a.m., but succumbed to his injuries at 11 a.m. on the same day. It is also on record that the scooter and the bus in question were found at the spot by the police officer deputed to investigate the case. Unfortunately, no eye witness was available and could be located. The insurance certificate of the vehicle was also brought on record. As already stated above, the insurance company in the reply did not deny involvement of red line bus No. DL-1P-2754 in the accident and even the time of the accident i.e. 7.40 a.m. in the morning. The site plan prepared by the police shows that the accident had taken place at the extreme left hand side of the road. The site plan also shows that the scooter was hit from the back side and the road in question is fairly broad with the divider in between. Unfortunately, the site plan was not proved in evidence and certified copy was not filed before

the learned Tribunal. However, evidence of PW-1, Head Constable Ranbir Singh, PS Seelampur was lead to prove charge sheet, FIR etc. It is admitted fact that the deceased was driving a scooter on a main road. The year was 1995. The time of the accident was early morning, when the roads are empty (this is also why there were no eye witnesses). In the claim petition it is specifically mentioned that the deceased was knocked down by the bus. The nature of injuries suffered by the deceased as per medical reports show that the bus had run over the deceased and his skull was crushed. These facts indicate unequivocally that the bus in question at the morning hours was being driven at a reasonably fast speed and had hit the scooter from the back side crushing the skull of the deceased. Admittedly, as per the respondent insurance company and the police there was no eye witness to the accident. The victim has expired. In these circumstances, I feel principles of res ipsa loquitur should be applied. Both the driver and the owner of the bus have failed to enter appearance. The respondents have failed to lead evidence to rebut and establish the cause of the accident. Accordingly, the respondents are held liable to pay compensation to the appellants in the claim petition filed under Section 166 of the Act.

17. On the question of the compensation payable to the appellants, it was stated in the claim petition that the deceased was

40 years old. He had left behind a mother, wife and six children including five minor children. The age of the deceased has been mentioned as 40 years in the post mortem report. On the question of income, it was stated in the claim petition that the deceased was earning Rs. 5000/- per month as commission from selling yarn. Evidence in form of certificate issued by Delhi Yarn Brokers' Association was produced. The said certificate states that the deceased was earning about Rs.5000/- per month. It is, however, not stated in the certificate how the said association was aware of the income of the deceased. The appellants did not produce copy of the bank account and other material to support and show the income that the deceased was earning. However, there is evidence in form of the FIR and the charge sheet which shows that the deceased at the time of the accident had two cheques of Rs.60,000/- and Rs. 1 lac. The cheques were for payment to third parties. He was driving a scooter. In addition, he also had Rs.255/- in his pocket. Keeping these aspects in mind, I feel that minimum wages payable to a semi skilled worker on the date of the accident can be taken as the basis for computing loss of dependency. Three children of the deceased were very young and aged between 7 to 11 years. The deceased was 40 years old and in normal course would have worked for another 20 years. There has been inflation and general increase in

income levels during the last 12 years. Keeping in view the rate of inflation and general increase in income, I feel partial benefit of future prospects should be awarded to the appellants. In view of the age of the deceased and the appellants, I feel multiplier of 12 should be applied to compute loss of dependency.

18. Accordingly, the loss of dependency is computed as under:

(a) Monthly income at the time of death: Rs.1661/-

(b) Annual income at the time of death:Rs. 19,932/-

(c) Annual income on the basis of partial future prospects (Increase in income by 50% instead of 100% increase) : Rs. 29,898/-

(d) Average annual income: (19,932 + 29,898) / 2 = Rs. 24,915/-

(e) Annual loss of dependency after deducting 1/3rd towards personal expenses:[Rs.24,915/- less]=Rs. 16,610/-

(f) Loss of dependency by applying multiplier of 12: Rs.1,99,320/-.

19. In addition to the above compensation the appellants should also be awarded Non-pecuniary compensation as follows:

i. Rs. 10,000/- towards loss of love and affection, the same being not for the loss of future pecuniary prospects but for loss of life and prospective happiness that results in pain and suffering.

ii. Loss of consortium to the spouse : Rs.5000/-.

iii. Rs.2000/- towards funeral expenses.

iv. Rs.2500/- towards loss of estate.

20. In view of the findings given above, I allow the present Appeal. The appellants are awarded total compensation of Rs. 2,18,820/- along with interest @ 6% per annum from the date of filing of the claim petition till payment. The mother will be entitled to 10% of the total compensation and the wife will be entitled to 25% of the total compensation. This includes Rs.5000/- payable to her for loss of consortium. The children of the deceased will be entitled to the balance amount in equal share. Compensation payable to the mother will be paid to her without lock in period. 50% of the compensation payable to the wife and children will be paid, and the balance amount of the 50% will be kept in post office or in a fixed deposit in a bank for a period of five years. The concerned appellants will be entitled to interest on the said deposit but will not be entitled to create any charge or encumbrance on the same.

21. No order as to costs.

(SANJIV KHANNA)
JUDGE

MARCH 21, 2007
VKR/P